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16 INC.; COMCAST OF MARIN I, INC.; COMCAST OF
17 MARIN II, INC.; COMCAST OF NORTHERN
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20 SACRAMENTO I, LLC; COMCAST OF
21 SACRAMENTO II, LLC; COMCAST OF SAN
22 LEANDRO, INC.; COMCAST OF SIERRA VALLEYS,
23 INC.

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION

27 JON HART, On Behalf of Himself and All Others
28 Similarly Situated, and On Behalf of the General Public,

Plaintiff,

v.

COMCAST OF ALAMEDA, INC.; COMCAST OF
CALIFORNIA II, INC.; COMCAST OF CALIFORNIA
III, INC.; COMCAST OF CALIFORNIA IX INC.;
COMCAST OF CALIFORNIA V INC.; COMCAST OF
CALIFORNIA VI INC.; COMCAST OF CALIFORNIA
X INC.; COMCAST OF CALIFORNIA XIII INC.;
COMCAST CORPORATION; COMCAST OF FRESNO,
INC.; COMCAST OF MARIN I, INC.; COMCAST OF
MARIN II, INC.; COMCAST OF NORTHERN
CALIFORNIA I, INC.; COMCAST OF NORTHERN
CALIFORNIA II, INC.; COMCAST OF
SACRAMENTO I, LLC; COMCAST OF
SACRAMENTO II, LLC; COMCAST OF SAN
LEANDRO, INC.; COMCAST OF SIERRA VALLEYS,
INC.; and DOES 1-250,

Defendants.

Case No. C-07-06350 PJH

**DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR JUDGMENT ON THE
PLEADINGS**

Date: May 21, 2008
Time: 9:00 a.m.
Dept: Courtroom 3
Judge: The Honorable
Phyllis J. Hamilton

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I. INTRODUCTION

This case presents a sweeping state law challenge to Comcast's management of congestive peer-to-peer ("P2P") file sharing protocols on its broadband Internet network. As explained below, the Court should issue a stay or enter judgment against Mr. Hart, as his claims are within the primary jurisdiction of the FCC, are preempted by federal law, and fail to state a claim under the laws of California (or any other state for that matter).

Mr. Hart posits that Comcast's management of P2P file sharing traffic violates California law because it is "unfair" and because any network management that may have the effect of slowing a particular activity renders "fraudulent" Comcast's advertisement of "high speed" service. Of course, if Comcast were required to permit P2P traffic to occupy its network unchecked by any form of management, as Mr. Hart here demands, then it would surely breach any alleged "promise" of "high speed" service for the vast majority of its subscribers. Indeed, "speed" would be the least of anyone's worries in the world that Mr. Hart envisions, as basic activities such as Web browsing and video streaming would be routinely degraded at any speed. In recognition of that fact, the FCC has declared that "reasonable network management" is integral to the provision of broadband Internet service. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 n.15 (2005) (hereinafter the "Internet Policy Statement").

It is no exaggeration to say that these issues are at the top of the FCC's agenda. The FCC has several open dockets that bear on these issues; is accepting public comment and hearing public testimony from various interested parties, including Comcast and purported consumer advocates; has been asked to declare that Comcast's network management is illegal; has been asked to enact formal rules for network management and disclosures; and has been asked to impose civil forfeitures on Comcast. *See In re Vuze, Inc., Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, WC Docket No. 07-52 (Nov. 14, 2007); *In re Free Press*,

1 *et al., Declaratory Ruling that Degrading an Internet Application Violates the FCC's*
 2 *Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network*
 3 *Management,"* WC Docket No. 07-52 (Nov. 1, 2007). Because these issues are within
 4 the subject matter jurisdiction of the FCC, and because the FCC is actively investigating
 5 them, this Court should stay its hand under the primary jurisdiction doctrine. To be clear,
 6 Comcast believes that regulation of network management by Internet Service Providers
 7 ("ISPs") is unnecessary and unwarranted, as the marketplace always has resolved and
 8 always will resolve such issues on its own. But the fact remains that the FCC is
 9 reviewing the very allegations that fuel this lawsuit. This Court should stay this action
 10 and allow the FCC to provide guidance in this important area before moving forward.

11 If the Court does not stay its hand, it should enter judgment against Mr. Hart. As a
 12 matter of federal law, the reasonableness of an ISP's network management cannot be
 13 determined by reference to any state's laws, let alone the disparate laws of fifty states.
 14 Congress has declared that the Internet should be "unfettered" by regulation, and nothing
 15 could conflict more with that policy than allowing each of the fifty states to establish its
 16 own framework for how ISPs may manage their networks. Indeed, a fifty-state morass of
 17 varying network management rules would make it virtually impossible for ISPs to
 18 operate their interstate networks with any consistency. And as a matter of state law,
 19 Comcast's conduct is not unfair, unlawful or "fraudulent." To the contrary, its conduct is
 20 absolutely necessary, abundantly reasonable and adequately disclosed; its advertisements
 21 were run-of-the-mill puffery that were neither untrue nor misleading; and its conduct did
 22 not breach any contractual or quasi-contractual duty it may have owed Mr. Hart.

23 Taken to their logical extreme, Mr. Hart's claims would prevent Comcast from
 24 filtering spam email (500 million of which its network filters each day), from intercepting
 25 viruses and other "malware," from addressing cyber-bullying, and from blocking child
 26 pornography – none of which would be good for anyone, including Mr. Hart. If this
 27 Court is inclined to move forward and adjudicate these claims without the benefit of the
 28 FCC's resolution of the matters now before it, then these claims should all be rejected.

II. BACKGROUND

A. Comcast's P2P Management Is Necessary

On a global level, the Internet deals with bandwidth congestion quite well. Information that is transmitted over the Internet is broken down into various “packets,” each of which is separately forwarded from one packet switch (or “node”) to another. Unlike traditional circuit-switched networks, packet-switched networks do not require a single, dedicated physical circuit from one end to the other for the duration of the communication session. Instead, packets of data are delivered over multiple physical paths, each of which may be automatically redirected in order to avoid congested areas, and reassembled for use when they reach their final destination. On a local level, however, bandwidth congestion is not so easily avoided. In that “last mile,” there is no multiplicity of nodes, and thus no way for packets to be rerouted around congested areas. This is especially true with “shared” networks, such as those used by cable and wireless providers. In short, if there is congestion, packets wait in line (and may even be lost) until it abates. As a result, one subscriber’s use can significantly affect another’s. *See, e.g., Christopher S. Yoo, Network Neutrality and the Economics of Congestion*, 94 Geo. L.J. 1847, 1852, 1862, 1875, 1879 (Aug. 2006).

Never has this phenomenon been more apparent than with P2P technology. P2P is a form of distributed computing that has become popular of late because it reduces the burden on content providers. A content provider that in the past had to transmit a complete copy of a file to every customer who requested it (and purchase many servers and much associated bandwidth in order to do so) can now publish a file once and rely on its customers to do the rest of the work. Take, for example, the BitTorrent protocol. BitTorrent allows a content provider to act as an “initial seeder” of a .torrent file. The initial person to download that file downloads it from the initial seeder, but as more peers download it, there will be more sources (or “seeders”) from which to download it. Subsequent downloaders can then download small “pieces” of the file from a “swarm” of perhaps hundreds or thousands of seeders who already have copies of it.

1 Although P2P reduces the burden on content distributors, it significantly increases
 2 the burden on networks, as the protocol is inherently inefficient. See James Martin &
 3 James Westall, *Assessing the Impact of BitTorrent on DOCSIS Networks*, at 1-2 (Sep.
 4 2007), available at <http://people.clemson.edu/~jmarty/papers/bittorrentBroadnets.pdf>; see
 5 also Gordon Haff, CNet Blogs, *Whatever else it is, P2P is inefficient* (Nov. 20, 2007),
 6 available at http://www.cnet.com/8301-13556_1-9821330-61.html. Decentralized file-
 7 sharing has certain benefits to be sure, but efficiency is not one of them. Nor was it
 8 meant to be. Bram Cohen, the creator of the BitTorrent protocol, was recently quoted as
 9 follows: “My whole idea was, ‘Let’s use up a lot of bandwidth,’ . . . I had a friend who
 10 said, ‘Well, ISPs won’t like that.’ And I said, ‘Why should I care?’” David Downs,
 11 *BitTorrent, Comcast, EFF Antipathetic to FCC Regulation of P2P Traffic*, S.F. Weekly
 12 (Jan. 23, 2008), available at [http://news.sfweekly.com/2008-01-23/news/bittorrent-](http://news.sfweekly.com/2008-01-23/news/bittorrent-comcast-eff-antipathetic-to-fcc-regulation-of-p2p-traffic)
 13 [comcast-eff-antipathetic-to-fcc-regulation-of-p2p-traffic](http://news.sfweekly.com/2008-01-23/news/bittorrent-comcast-eff-antipathetic-to-fcc-regulation-of-p2p-traffic). That inefficiency takes its toll
 14 on broadband networks. Indeed, P2P accounts for 50 to 95% of all broadband traffic,¹
 15 and studies have demonstrated that as few as *fifteen* BitTorrent users can congest the
 16 network associated with a node, significantly affecting Internet telephony (VoIP), online
 17 gaming, and other common Internet applications. See Martin & Westall at 6; see also
 18 Leslie Ellis, *BitTorrent’s Swarms Have a Deadly Bite on Broadband Nets*, Multichannel
 19 News (May 8, 2006), available at <http://www.multichannel.com/article/CA6332098.html>.

20 Although Comcast invests hundreds of millions of dollars every year to improve
 21 the speed and scope of its network,² its bandwidth, like any ISP’s bandwidth, is finite.
 22 Broadband providers are thus faced with a choice: either allow P2P protocols to degrade

23 ¹ See Downs, *supra*; Yoo, *supra*, at 1879 n.145; Peter Svensson, Associated Press, *Comcast Blocks*
 24 *Some Internet Traffic* (Oct. 19, 2007), available at <http://www.msnbc.msn.com/id/21376597>; Ipoque,
 25 *Internet Study 2007* (2007), available at [http://www.ipoque.com/media/internet_studies/internet_study](http://www.ipoque.com/media/internet_studies/internet_study_2007)
 26 [2007](http://www.ipoque.com/media/internet_studies/internet_study_2007); Avis Rivers, *Network Neutrality: Hysteria Makes for Bad Law*, Seattle Times (Dec. 20, 2007),
 27 available at http://seattletimes.nwsource.com/html/opinion/2004083048_broadband20.html.

28 ² For example, Comcast is working toward deploying later this year a DOCSIS 3.0 technology that
 will significantly increase bandwidth, allowing subscribers to download a high-definition movie in less
 than four minutes. See Fact Sheet, *Comcast’s Network: America’s Leading Network* (Jan. 9, 2008),
 available at <http://www.comcast.com/ces/content/images/Wideband/WidebandNetworkFS.pdf>.

the experience of all subscribers or use tools that manage P2P protocols as infrequently and innocuously as possible.³ Consistent with the FCC’s pronouncements in this area, Comcast has chosen the latter. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 n.15 (2005) (“The principles we adopt are subject to reasonable network management.”). Indeed, even the Distributed Computing Industry Association, whose members develop P2P protocols, concedes that its members “should bear some meaningful responsibility for consuming disproportionate amounts of network resources” and ISPs “should be permitted to take into account and manage their networks to address any such impact.” DCIA, *Comment On Petition For Rulemaking*, No. 07-52, at 9 (Feb. 13, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841058.

Network management, it should also be noted, does more than enable ISPs to address congestion in the short term. Opponents of network management posit a world in which ISPs waive a magic wand and have infinite bandwidth, making management unnecessary. But that isn’t possible today and it never will be. *See generally* Yoo, *supra*. Increasing bandwidth capacity is an extremely expensive and labor-intensive endeavor. Allowing ISPs to manage their networks in order to address occasional congestion allows them to defer some of those costs and, in turn, avoid raising subscriber fees and allocate funds toward expanding and upgrading networks. In short, network management allows ISPs to offer service to those who otherwise could not receive or pay for it, especially low- and fixed-income subscribers and rural subscribers. *Id.* at 1853-55, 1885, 1908.

B. Comcast’s P2P Management Is Reasonable

Managing a network is a dynamic exercise, changing – often in real time – as new technologies emerge and subscriber habits evolve. That said, Comcast’s current P2P management measures can be summarized as follows: if P2P protocols that have a history

³ A third option would be to prohibit and block P2P outright. Comcast does not, but notes that some academic institutions do. *See, e.g.*, Harvard Medical School, Information Technology Department, *HMS IT Peer To Peer (P2P) Policy*, available at http://it.med.harvard.edu/pg.asp?pn=security_p2p.

1 of congesting Comcast's network reach a preset level in a neighborhood, Comcast begins
 2 issuing instructions called "reset packets"⁴ in order to temporarily limit the number of
 3 new unidirectional uploads (*i.e.*, uploads that occur when the subscriber is not also
 4 downloading) those P2P protocols can initiate in that neighborhood until the congestion
 5 in the neighborhood drops below the predetermined level. Comcast does **not** manage
 6 downloads, does **not** manage bidirectional uploads (*i.e.*, uploads that occur when the
 7 subscriber is also downloading), does **not** manage uploads that are already underway, and
 8 does **not** "block" even the P2P uploads that it does temporarily manage.⁵

9 This practice is entirely reasonable. First, because computers commonly receive
 10 reset packets when network problems occur, applications and services know to
 11 automatically try to reestablish the P2P connection without the subscriber's having to
 12 manually intervene. That is especially useful for P2P users, who often set up their
 13 computers to seed files while they are unattended. *See* Pete Abel, *Fair vs. Foul in Net*
 14 *Neutrality Debate*, themoderatevoice.com (Nov. 24, 2007), available at [http://the-](http://the-moderatevoice.com/media/internet/16239/fair-vs-foul-in-net-neutrality-debate)
 15 [moderatevoice.com/media/internet/16239/fair-vs-foul-in-net-neutrality-debate](http://the-moderatevoice.com/media/internet/16239/fair-vs-foul-in-net-neutrality-debate). Indeed,
 16 this network management practice is designed only to affect unidirectional uploads,
 17 which is to say only computers that are uploading but not downloading at the same time –
 18 a telltale sign of an unattended computer.

19 Second, there is no direct effect on P2P **downloads** by Comcast's subscribers, and
 20 little if any indirect effect on downloads by anyone. At most, if new unidirectional
 21 uploads have been temporarily foreclosed in a given neighborhood due to localized
 22 network congestion, there would be a very brief delay as a downloader's P2P protocol
 23 seeks out copies of the file from a different peer. In the typical P2P situation,⁶ when a

24 ⁴ A "reset" is simply a bit in the packet header that signals that a new connection needs to be
 25 established because there are error conditions in the network.

26 ⁵ *See, e.g.*, Richard Bennett, *Harold and Kumar Go to Comcast* (Nov. 6, 2007), available at
 27 http://www.theregister.co.uk/2007/11/06/richard_bennett_comcast ("BitTorrent isn't disabled on the
 Comcast network. I'm a Comcast customer, and as I write this I'm seeding several video files. . . .").

28 ⁶ Much of the hullabaloo over P2P management began as a result of an Associated Press test in
 which the P2P swarming functionality was bypassed by searching for a unique file from a unique seeder.

1 download begins, the P2P protocol searches for multiple seeders that have the same file.
 2 Thus, even if one seeder's uploading is delayed, the protocol is already searching for, and
 3 in the vast majority of cases has already found, other seeders from which to download.
 4 Moreover, the network will allow the computer to begin uploading once congestion has
 5 abated, which could be anywhere from a few milliseconds to a few minutes. In light of
 6 the fact that P2P protocols are often used for files that may take hours to transmit, any
 7 such delay would be negligible. And in light of the delays other subscribers would
 8 experience were P2P not managed, it would be more than fair.

9 Third, although there are various ways to address congestion generally, there are
 10 few practical ways to address the congestion caused by P2P. See George Ou, *EFF Wants*
 11 *to Saddle You with Metered Internet Service*, Real World IT, ZDNet Blogs (Dec. 3,
 12 2007), available at <http://blogs.zdnet.com/ou/?p=914&page=3> ("Since BitTorrent has no
 13 such congestion control mechanism . . . , the only machine language it understands" is
 14 reset packets, a technique that "is common in the networking and software industry where
 15 alternatives don't exist."); George Ou, *A Rational Debate on Comcast Traffic*
 16 *Management*, Real World IT, ZDNet Blogs (Nov. 6, 2007), available at [http://blogs.](http://blogs.zdnet.com/ou/?p=852&page=3)
 17 [zdnet.com/ou/?p=852&page=3](http://blogs.zdnet.com/ou/?p=852&page=3); Richard Bennett, The Register, *Dismantling a Religion:*
 18 *The EFF's Faith-Based Internet* (Dec. 13, 2007), available at [http://www.theregister.co.](http://www.theregister.co.uk/2007/12/13/bennett_eff_neutrality_analysis)
 19 [uk/2007/12/13/bennett_eff_neutrality_analysis](http://www.theregister.co.uk/2007/12/13/bennett_eff_neutrality_analysis) ("The Internet's traffic toolkit is nearly
 20 barren, so it's no wonder that Comcast and its peers would use" reset packets "to
 21 accomplish an end that all rationale people agree is worthwhile."); DCIA, *Comment on*
 22 *Petition for Rulemaking*, *supra*, at 5. Accordingly, many ISPS use management tools that
 23 are similar to, if not substantially the same as, the ones currently used by Comcast. See,
 24 e.g., http://www.azureuswiki.com/index.php/Bad_ISPs#United_States_of_America.

25 Finally, Comcast's network management practices are narrowly tailored. They are
 26

27 See Peter Svensson, Associated Press, *How The AP Tested Comcast's File-Sharing Filter* (Oct. 19, 2007),
 28 available at <http://abcnews.go.com/Technology/wireStory?id=3750910>.

1 content-agnostic, meaning they do not manage uploads based on content; they were
 2 designed (and will continue to be refined) to affect only those P2P protocols that have
 3 historically had a congestive effect on Comcast's network; and they are only activated if
 4 a predetermined threshold of network activity is reached and are suspended as soon as it
 5 abates. In short, they are minimally intrusive and were designed solely to ensure that the
 6 needs of the many are not outweighed by the needs of the few – or the one.

7 **C. Comcast's P2P Management Is Disclosed**

8 Mr. Hart admits that he subscribed to Comcast's high-speed Internet service in
 9 September 2007 and, before doing so, reviewed and agreed to the terms and conditions of
 10 the subscriber agreement that was posted on Comcast's website. Pl.'s Compl. ¶¶ 41-42.
 11 He therefore admits that he agreed to comply with the terms of the then-applicable
 12 Acceptable Use Policy ("AUP"). Comcast Agreement for Residential Services § 7,
 13 available at <http://www6.comcast.net/terms/subscriber>. The AUP disclosed that, because
 14 Comcast's service was offered via a shared network, subscribers could not use the service
 15 in a way that would adversely affect others. See AUP § 7, previously available at
 16 <http://www6.comcast.net/terms/use> ("Prohibited uses include . . . generating levels of
 17 traffic sufficient to impede others' ability to send or retrieve information") (Exhibit A to
 18 RFJN); *id.*, Network, Bandwidth, Data Storage and Other Limitations ("You shall ensure
 19 that your use of the Service does not restrict, inhibit, interfere with, or degrade any other
 20 user's use of the Service, nor represent (in the sole judgment of Comcast) an overly large
 21 burden on the network. . . ."). The AUP also disclosed that Comcast would take
 22 appropriate action to prevent subscribers from engaging in prohibited uses, including
 23 managing individual transmissions when necessary. *Id.*, Inappropriate Content and
 24 Transmissions ("Comcast reserves the right . . . to refuse to transmit or post and to
 25 remove or block any information or materials, in whole or in part, that it, in its sole
 26 discretion, deems to be offensive, indecent, or otherwise inappropriate. . . ."); *id.*,
 27 Violation of Acceptable Use Policy ("Comcast and its suppliers reserve the right at any
 28 time to monitor bandwidth. . . . [I]f the Service is used in a way that Comcast or its

1 suppliers . . . believe violate this AUP, Comcast or its suppliers may take any responsive
 2 actions they deem appropriate. These actions include . . . the immediate suspension or
 3 termination of all or any portion of the Service.”).

4 Mr. Hart’s subscriber agreement also disclosed that Comcast’s service would not
 5 be free of delays and was therefore not appropriate for uses that require delay-free
 6 performance. See Comcast Agreement for Residential Services, ¶ 10 (“NEITHER
 7 COMCAST NOR ITS AFFILIATES . . . WARRANT THAT THE COMCAST
 8 EQUIPMENT OR THE SERVICES WILL MEET YOUR REQUIREMENTS,
 9 PROVIDE UNINTERRUPTED USE, OR OPERATE AS REQUIRED, WITHOUT
 10 DELAY. . . .”) (typography in original); *id.* § 11(e). It also disclosed that Comcast could
 11 manage its network by monitoring it for objectionable transmissions and managing such
 12 transmissions when it became necessary to do so:

13 [Y]ou acknowledge and agree that Comcast and its agents have the right to
 14 monitor, from time to time, any such postings and transmissions. . . . We
 15 reserve the right to refuse to upload, post, publish, transmit or store any
 information or materials, in whole or in part, that, in our sole discretion, is
 unacceptable, undesirable or in violation of this agreement.

16 *Id.* § 3(b).

17 Comcast is constantly in the process of updating its AUP and FAQs in order to
 18 reflect its present practices and respond to its customers’ questions. To that end, a recent
 19 revision to the AUP describes Comcast’s P2P network management in even more detail:

20 Comcast uses various tools and techniques to manage its network. . . .
 21 These tools and techniques are dynamic, like the network and its usage, and
 22 can and do change frequently. For example, these network management
 23 activities may include . . . temporarily delaying peer-to-peer sessions (or
 sessions using other applications or protocols) that users of the Service may
 wish to establish during periods of high network congestion [and] limiting
 the number of peer-to-peer sessions users of the Service may establish. . . .

24 AUP, available at <http://www6.comcast.net/terms/use>. Comcast’s FAQs were recently
 25 revised as well: “Comcast may on a limited basis temporarily delay certain P2P traffic
 26 when that traffic has, or is projected to have, an adverse effect on other customers’ use of
 27 the service. . . .” Frequently Asked Questions About Network Management, available at
 28 http://www.comcast.net/help/faq/index.jsp?faq=SecurityNetwork_Management19163.

III. DISCUSSION

A. Plaintiff's Claims Are Within The FCC's Primary Jurisdiction

The primary jurisdiction doctrine promotes “uniformity in administration” of regulatory law by “ensuring that administrative bodies possessed of both expertise and authority delegated by Congress pass on issues within their regulatory authority before consideration by the courts.” *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362, 1365 (9th Cir. 1987). Pursuant to this doctrine, a court is “obliged to defer” to an agency where the “issue brought before a court is in the process of litigation through procedures originating in the [agency].” *Fed. Power Comm’n v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972). As the Ninth Circuit has said, “an issue either is within an agency’s primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination.” *Gen. Dynamics*, 828 F.2d at 1364 n.15; *see also Phone-Tel Commc’ns, Inc. v. AT&T Corp.*, 100 F. Supp. 2d 313, 321 (E.D. Pa. 2000).

GTE.net LLC v. Cox Commc’ns, Inc., 185 F. Supp. 2d 1141, 1147 (S.D. Cal. 2002) is instructive. In *GTE.net*, the parties disputed whether cable Internet qualified as a “telecommunications service” under the Telecommunications Act. After acknowledging the “widespread and frustrating disagreement over the proper classification of cable Internet service” that had prompted the FCC to examine the issue, the court decided to stay the proceedings: “The regulation of cable Internet involves complex issues with far-reaching consequences. The issue is clearly not being taken lightly by the experts at the FCC, and this Court defers to that concern and pending investigation.” *Id.* at 1445.

Any inquiry into whether Comcast’s P2P management is unlawful falls squarely within the FCC’s subject matter jurisdiction. *See id.*; *In re Inquiry Concerning High-Speed Access to the Internet Over Cable*, 17 F.C.C.R. 4798, ¶ 77 (2002), *aff’d National Cable Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976, 980, 996 (2005); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, ¶ 109 (2005); *In re Broadband Industry Practices*, NOI, 22 F.C.C.R. 7894, ¶ 4 (2007); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871,

1 879-80 (9th Cir. 2000); *Metrophones Telecomms. Inc. v. Global Crossing Telecomms.*
 2 *Inc.*, 423 F.3d 1056, 1070 (9th Cir. 2005). In fact, the FCC has multiple dockets open
 3 that seek public comment on whether it should adopt rules implementing its Internet
 4 Policy Statement, and it is actively investigating whether ISPs in general, and Comcast in
 5 particular, may use the sort of network management tools that are at issue here:

6 • **March 22, 2007.** The FCC issues a Notice of Inquiry asking “whether
 7 network platform providers and others favor or disfavor particular content, how
 8 consumers are affected by these policies, and whether consumer choice of broadband
 9 providers is sufficient to ensure that all such policies ultimately benefit consumers. . . .”
 10 *In re Broadband Industry Practices*, NOI, 22 F.C.C.R. 7894, ¶ 1 (2007).⁷

11 • **November 1, 2007.** Free Press files a Petition alleging that Comcast is
 12 degrading P2P traffic in violation of the FCC’s Internet Policy Statement. *In re Free*
 13 *Press, et al., Declaratory Ruling that Degrading an Internet Application Violates the*
 14 *FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable*
 15 *Network Management,”* WC Docket No. 07-52 (2007), available at [http://fjallfoss.fcc.](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519825121)
 16 [gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519825121](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519825121). It asks the
 17 FCC to enjoin Comcast from managing P2P traffic, to impose fines for every subscriber
 18 affected, including Mr. Hart, and to declare Comcast’s business practices deceptive.

19 • **November 14, 2007.** Vuze files a Petition asking the FCC “to examine the
 20 network operators’ network management practices and to adopt reasonable rules that
 21 would prevent the network operators from engaging in practices that discriminate against
 22 particular Internet applications, content or technologies.” *In re Vuze, Inc., Petition to*
 23 *Establish Rules Governing Network Management Practices by Broadband Network*
 24 *Operators*, WC Docket No. 07-52, at ii (2007), available at <http://fjallfoss.fcc.gov/>

25 ⁷ See also *In re Appropriate Framework for Broadband Access to the Internet over Wireline*
 26 *Facilities*, Report & Order & NPRM, 20 F.C.C.R. 14853, 14929-35, ¶¶ 146-59 (2005); *Inquiry*
 27 *Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable*
 28 *Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable*
Facilities, Declaratory Ruling and NPRM, 17 F.C.C.R. 4798, 4839-54 ¶¶ 72-111 (2002).

prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519811711.

- **January 8, 2008.** FCC Chairman Kevin Martin announces that the FCC will “investigate complaints that Comcast Corp. actively interferes with Internet traffic as its subscribers try to share files online.” Associated Press, *House Committee Launches Probe of FCC Management*, Wall Street Journal, at B9 (Jan. 8, 2008), available at http://online.wsj.com/article/SB119982972316175627.html?mod=googlenews_wsj.

- **January 14, 2008.** The FCC issues two Public Notices that seek comment on the Vuze and Free Press Petitions. *FCC Public Notice, Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies*, WC Docket No. 07-52 (2008); available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519837887; *FCC Public Notice, Comment Sought on Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators*, WC Docket No. 07-52 (2008); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-92A1.pdf.

- **February 13, 2008.** Representative Markey introduces legislation that would require the FCC to complete an investigation and report to Congress within one year. *See Internet Freedom Preservation Act*, H.R. 5353, 110th Cong. (2nd Sess.).

- **February 25, 2008.** The FCC holds public hearings on P2P management, during which Comcast and others offer statements and other evidence concerning the necessity and reasonableness of its network management practices and disclosures.

Because the FCC is actively reviewing the conduct that Mr. Hart complains about, and because that conduct falls squarely within the FCC’s subject matter jurisdiction, this Court should stay this action and allow the FCC to make an initial determination regarding the reasonableness of P2P management. Doing so would preserve resources, promote comity, and prevent potentially conflicting judgments.⁸

⁸ Of course, the Court also has the inherent authority to stay this action if the primary jurisdiction doctrine is found to be inapplicable. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003).

B. Mr. Hart's Claims Are Preempted By Federal Law

In the event the Court does not stay this action in deference to the FCC, the Plaintiff's claims should all be dismissed because they are preempted by federal law. The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, preempts state laws that "interfere with or are contrary to, the laws of Congress" *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). In determining whether there is federal preemption, Congress's intent is the "ultimate touchstone of [the] analysis." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent to preempt may be implied from the scope or effect of federal law, but may be expressly stated as well.

The Supreme Court's recent decision in *Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S.Ct. 989 (2008) is instructive. In *Rowe*, the State of Maine passed laws that were meant to prevent the transportation of tobacco products to minors. Transport carriers associations sought to have the state laws stricken as preempted by a federal statute that deregulated the trucking industry and preempted state laws that conflicted with that federal deregulatory policy. The District Court, the Circuit Court, and the Supreme Court all agreed that the state laws, though well meaning, were preempted:

The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for "competitive market forces" in determining (to a significant degree) the services that motor carriers will provide. . . . To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

Id. at 995-96.

Here, Congress has expressed its intent to preempt state regulation of the Internet, declaring that "the policy of the United States" is "to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet" by ensuring that it remains "unfettered by Federal or State regulation." 47 U.S.C. § 230(b); *id.* § 230(e)(3) ("No cause of action may be brought and

1 no liability may be imposed under any State or local law that is inconsistent with this
 2 section.”); *see also* Telecommunications Act of 1996, P.L. 104-104, Title VII, § 706, 110
 3 Stat. 153 (codified at 47 U.S.C. § 157 note) (“the deployment on a reasonable and timely
 4 basis of advanced telecommunications capability to all Americans” should be encouraged
 5 through “regulatory forbearance”). By any measure, that policy has been a resounding
 6 success. When the Internet first emerged, it was accessible to only a handful of people.
 7 It is now available and affordable to hundreds of millions of people, from all parts of the
 8 country and all walks of life. In short, it has become a ubiquitous part of every day life.

9 Federal courts have given effect to § 230(b)(2). For example, in *Southwestern*
 10 *Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998), landline telephone companies
 11 appealed an FCC order which, among other things, exempted ISPs from paying the
 12 interstate access charges that they as common carriers were required to pay. The FCC
 13 relied on § 230(b)(2) in concluding that ISPs should be unfettered from such state
 14 regulation, and the United States Court of Appeals for the Eighth Circuit affirmed its
 15 reliance on § 230(b)(2). *Id.* at 544. Similarly, in *Vonage Holdings Corp. v. MPUC*, 290
 16 F. Supp. 2d 993 (D. Minn. 2003), the State of Minnesota tried to regulate Vonage’s
 17 Internet telephone (VoIP) service as if Vonage were a traditional landline telephone
 18 carrier. The FCC again concluded that state regulation was preempted. In an opinion
 19 that was later affirmed by the Eighth Circuit, the United States District Court for the
 20 District of Minnesota cited § 230(b)(2) in support of its affirmance of the FCC’s ruling.
 21 *Id.* at 997 (“Congress has spoken with unmistakable clarity on the issue. . .”).

22 For its part, the FCC has frequently cited § 230(b)(2) and the national policy of
 23 regulatory forbearance where the Internet is involved. *See, e.g., In re Vonage Holdings*
 24 *Corp.*, 19 F.C.C.R. 22404, ¶¶ 22-24, 34-37 (2004); *In re Amendment of Parts 1, 21, 73,*
 25 *74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile*
 26 *Broadband Access, Educ. and Other Advanced Servs. in the 2150-2162 and 2500-2690*
 27 *MHz Bands*, 18 F.C.C.R. 6722, ¶ 34 (2003) (“Broadband services should exist in an
 28 environment that eliminates regulations that deter investment and innovation. . .”);

1 *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*,
 2 *Universal Service Obligations of Broadband Providers*, 17 F.C.C.R. 3019, ¶ 5 (2002)
 3 (“broadband services should exist in a minimal regulatory environment that promotes
 4 investment and innovation. . . .”); *In re Inquiry Concerning High-Speed Access to the*
 5 *Internet Over Cable*, 17 F.C.C.R. 4798, ¶ 73 (2002) (“we are mindful of the need to
 6 minimize both regulation of broadband services and regulatory uncertainty. . . .”).

7 The need to maintain a uniform regulatory framework for the Internet is critical.
 8 Permitting state law claims such as those asserted in this case to proceed would create a
 9 patchwork of fifty different standards regarding the propriety of network management, an
 10 untenable result that flies in the face of § 230(b)(2). As the FCC has explained:

11 We would be concerned if a patchwork of State and local regulations
 12 beyond matters of purely local concern resulted in inconsistent
 13 requirements affecting cable modem service, the technical design of the
 14 cable modem service facilities, or business arrangements that discouraged
 cable modem service deployment across political boundaries. We also
 would be concerned if State and local regulations limited the Commission’s
 ability to achieve its national broadband policy goals. . . .

15 *Id.* ¶ 97. Those concerns are well founded, for the inevitable morass of conflicting state
 16 regulation would make Internet services impractical, if not impossible, to provide. *See*
 17 *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, ¶ 30 (“Due to the intrinsic ubiquity of
 18 the Internet, nothing short of Vonage ceasing to offer its service entirely” could prevent it
 19 from being subjected to regulations imposed by “more than 50 separate jurisdictions.”);
 20 *id.* ¶ 37 (“Allowing Minnesota’s order to stand would invite similar imposition of 50 or
 21 more additional sets of different economic regulations on DigitalVoice, which could
 22 severely inhibit the development of this and similar VoIP services. We cannot, and will
 23 not, risk eliminating or hampering this innovative advanced service. . . .”); *id.* ¶ 35 (“[I]n
 24 interpreting section 230 . . . we cannot permit more than 50 different jurisdictions to
 25 impose traditional common carrier economic regulations . . . and still meet our
 26 responsibility to realize Congress’s objective.”).⁹

27 ⁹ These concerns have caused courts and the FCC to alternatively invoke the Commerce Clause to
 28 strike down legislation regulating the Internet. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir.

1 Regulation through private litigation rather than public legislation raises the same
 2 concerns and suffers the same fate. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996)
 3 (Breyer, J. concurring) (“[The] effects of the state agency regulation and the state tort suit
 4 are identical” and to “distinguish between them for pre-emption purposes would” be an
 5 “anomalous result.”); *see also Cipollone*, 505 U.S. at 521 (“[R]egulation can be as
 6 effectively exerted through an award of damages as through some form of preventive
 7 relief. The obligation to pay compensation can be, indeed is designed to be, a potent
 8 method of governing conduct and controlling policy.”). Here, Mr. Hart’s claims are at
 9 loggerheads with Congress’s sound decision to free the Internet from state regulation.
 10 Nothing could more clearly conflict with the objectives of Congress than allowing claims
 11 like this to proceed in state court or under state law. Accordingly, Mr. Hart’s claims are
 12 preempted by federal law and Comcast is entitled to the entry of judgment in its favor.

13 **C. Mr. Hart’s Claims Fail As A Matter Of State Law**

14 If this Court were to proceed without a stay under the primary jurisdiction
 15 doctrine, and assuming for the sake of argument there is no federal preemption, the Court
 16 should nonetheless enter judgment against Mr. Hart because he cannot state a claim under
 17 the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, the Consumer
 18 Legal Remedies Act (CLRA), Cal. Civ. Code § 1770 (CLRA), the False Advertising Law
 19 (FAL), Cal. Bus. & Prof. Code § 17500, or any other state law for that matter. We begin
 20 with the claim that P2P management is actionable under § 17200 as “unfair.”

21 **1. Comcast’s Conduct Is Not “Unfair”**

22 California courts have been unable to agree on one definition of the term “unfair”
 23 as used in the UCL. Recently, the Ninth Circuit approved two “unfairness” tests. *Lozano*

24 _____
 25 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Civil Liberties Union v.*
 26 *Johnson*, 194 F.3d 1149, 1162-63 (10th Cir. 1999) (“[C]ertain types of commerce have been recognized
 27 as requiring national regulation. The Internet is surely such a medium.”); *Center for Democracy and*
 28 *Tech. v. Pappert*, 337 F. Supp. 2d 606, 662-63 (E.D. Pa. 2004); *Am. Libraries Assoc. v. Pataki*, 969 F.
 Supp. 160, 183 (S.D.N.Y. 1997) (“[C]ertain types of commerce demand consistent treatment and are
 therefore susceptible to regulation only on a national level. The Internet represents one of those areas...”);
In re Vonage Holdings Corp., 19 F.C.C.R. 22404, ¶¶ 38-41.

1 *v. AT&T Wireless Servs.*, 504 F.3d 718, 735-36 (9th Cir. 2007). After *Lozano*, courts
 2 may apply a balancing test that weighs the alleged impact on the plaintiff against the
 3 justifications of the defendant, or may apply an arguably narrower test that requires that
 4 the plaintiff's claim be "tethered" to a declared legislative policy. *Id.*; *Morris v. BMW of*
 5 *N. Am., LLC*, No. 07-2827, 2007 U.S. Dist. LEXIS 85513, *21 (N.D. Cal. Nov. 7, 2007).

6 *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255 (2006) is instructive.
 7 In *Bardin*, the plaintiffs claimed that the defendant's use of tubular steel in its exhaust
 8 manifolds violated the UCL because the industry standard was to use more durable cast-
 9 iron instead. The court rejected their claim, reasoning that any impact on the plaintiffs
 10 was theoretical and outweighed by the defendant's business justifications, *id.* at 1270,
 11 and in any event the "the right to have a vehicle containing an exhaust manifold that lasts
 12 as long as an 'industry standard' cast-iron exhaust manifold is one based on a contract
 13 such as a warranty, not on a legislatively declared policy." *Id.* at 1273.

14 As in *Bardin*, the proper test to apply in this case is an interesting but ultimately
 15 academic question, as Comcast's conduct cannot be considered "unfair" under either test.
 16 First, the FCC has explicitly decided to permit reasonable network management, and it is
 17 not for this Court to revisit – let alone reverse – that sound policy decision. *See, e.g.,*
 18 *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182-83 (1999) ("If
 19 the Legislature has permitted certain conduct or considered a situation and concluded no
 20 action should lie, courts may not override that determination."); *Chavez v. Whirlpool*
 21 *Corp.*, 93 Cal. App. 4th 363, 375 (2001). Second, the "fairness" or "reasonableness" of
 22 these practices is not something that should be decided by reference to state law or in this
 23 forum, at least not initially. *See supra*. Finally, if the Court is inclined to reach the issue,
 24 this practice is more than fair: it has no discernible effect on Comcast subscribers or
 25 others; it is content agnostic; it only affects those protocols that have historically had a
 26 congestive effect on Comcast's network; and it is only activated when there is congestion
 27 and is suspended as soon as congestion abates. It is also absolutely necessary, making it
 28 possible to deliver the services that millions of Americans enjoy and rely on every day,

1 such as dialing 911 with VoIP services, viewing Presidential debates, or blogging about
 2 current events, just to name a few. It simply cannot be considered unfair to temporarily
 3 place the needs of the vast majority of subscribers above the desires of a small minority
 4 of subscribers whose conduct could consume all available network bandwidth. Indeed, it
 5 would be unfair to subscribers who do *not* use bandwidth-intensive P2P protocols to
 6 allow their Internet service to be degraded by the few subscribers who do. *See, e.g.,*
 7 *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (2003) (dismissing UCL
 8 claim because dealer's commission system was standard in the industry); *Walker v.*
 9 *Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1175 (2002) (rejecting UCL
 10 claim due to utility of defendant's property inspection fee).

11 **2. Comcast's Conduct Is Not "Unlawful"**

12 Mr. Hart also alleges that Comcast's business practices are "unlawful" because he
 13 believes they violate the FCC's Internet Policy Statement and Section 1030(a)(5)(A)(1)
 14 of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. He is mistaken.

15 Mr. Hart's unlawfulness claim fails as it relates to the Internet Policy Statement
 16 not only because that document expressly permits reasonable network management, but
 17 also because it is a statement of *policy*, not of prescriptive rules. *In re Appropriate*
 18 *Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R.
 19 14986, 14988 n.15 (2005) ("Accordingly, we are not adopting rules in this policy
 20 statement."). That document was issued without the benefit of a notice-and-comment
 21 rulemaking proceeding, was not published in the Code of Federal Regulations or even the
 22 Federal Register, and by its terms is only a statement of hortatory "principles," not
 23 prescriptive rules. To be sure, the FCC is debating whether to adopt formal rules along
 24 the lines of those informal policies. But unless and until it does, there is no "law" to be
 25 violated, and thus no basis for an unlawfulness claim. *Brock v. Cathedral Bluffs Shale*
 26 *Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986); *Wilderness Soc'y v. Norton*, 434 F.3d 584,
 27 597 (D.C. Cir. 2006); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 489 (D.C.
 28 Cir. 1998); *Metro Publ'g Ltd. v. San Jose Mercury News*, 861 F. Supp. 870, 881 (N.D.

1 Cal. 1994) (dismissing “unlawfulness” claim because underlying claim lacked merit).

2 Mr. Hart’s claim fails as it relates to Section 1030(a)(5)(A)(1) of the CFAA
 3 because Comcast did not violate it. First, that provision only prohibits activities that
 4 “damage” a computer. *See* 18 U.S.C. § 1030(a)(5)(A)(1); *id.* § (e)(8) (defining “damage”
 5 as “any impairment to the integrity or availability of data, a program, a system, or
 6 information”). Mr. Hart’s computer has not been “damaged.” Because any files he
 7 uploaded remain on his computer unless he himself deleted them, the “integrity” of those
 8 files has not been impaired. *Cf. Worldspan L.P. v. Orbitz, LLC*, No. 05-5386, 2006 U.S.
 9 Dist. LEXIS 26153, at *14-15 (D. Ill. 2006); *Resdev, LLC v. Lot Builders Ass’n*, No. 04-
 10 1374, 2005 U.S. Dist. LEXIS 19099, at *13 n.3 (M.D. Fla. 2005); *Lockheed Martin Corp.*
 11 *v. Speed*, No. 05-1580, 2006 U.S. Dist. LEXIS 53108 (M.D. Fla. 2006). And because
 12 Comcast does not manage downloads, the “availability” of information to him has not
 13 been affected. As for any anonymous third parties to whom Mr. Hart may have tried to
 14 send pieces of a file, the availability of information to them also has not been impaired.
 15 Due to the swarming nature of P2P, if a downloader has trouble connecting with a seeder,
 16 her computer instantaneously seeks out a new one. Mr. Hart obviously knows this, as he
 17 cited no specific delay in downloading by anyone. It bears repeating that the use of
 18 “reset” packets in connection with packet-based communication sessions is a ubiquitous
 19 industry practice that has inflicted no damage on the nearly infinite number of computers
 20 that have received them over time.

21 Second, even if Mr. Hart’s computer had been “damaged,” which it was not, he
 22 has failed to allege that the damage resulted in a “loss,” either to him or to anyone else,
 23 that exceeds \$5,000. *See* 18 U.S.C. § 1030(a)(5)(B)(i). A claim under § 1030(a)(5)
 24 requires plaintiffs to plead and prove that a defendant’s conduct caused a \$5,000 loss or
 25 other effects (such as physical injury) not relevant here. *See id.* § 1030(a)(5)(B)(i)-(iv).
 26 Here, Mr. Hart claims Comcast has caused a loss in excess of \$5,000. Pl.’s Compl. ¶ 88.
 27 However, the CFAA was amended in 2001 in order to limit “loss” to the costs of
 28 “responding to an offense, conducting a damage assessment, and restoring the data,

1 program, system, or information to its condition prior to the offense, and any revenue
 2 lost, cost incurred, or other consequential damages incurred because of interruption of
 3 service.” *Id.* § 1030(e)(11); *see also Resdev, LLC*, 2005 U.S. Dist. LEXIS 19099, at *7.
 4 Mr. Hart has not alleged that he spent any time or money restoring data or information.
 5 Nor has he alleged that he lost any information. He simply states that his losses exceed
 6 \$5,000. Pl.’s Compl. ¶ 8. That is not enough. *Second Image, Inc. v. Ronsin Photocopy,*
 7 *Inc.*, No. 07-5424, 2007 U.S. Dist. LEXIS 95417, at *3-4 (N.D. Cal. 2007) (Hamilton, J.).

8 Third, Comcast did not act “without authorization.” 18 U.S.C. § 1030(a)(5)(A)(1).
 9 Quite the opposite, in fact, as Mr. Hart’s contract authorizes Comcast to monitor network
 10 congestion and take remedial action. As a result, Mr. Hart asks the Court to focus not on
 11 the end (managing P2P seeding), but on the means (transmitting reset packets). To him,
 12 the issue here is whether the transmission of reset packets was authorized. Pl.’s Compl. ¶
 13 88 (“Under the CFAA, it is unlawful to knowingly and without authorization cause the
 14 transmission of a program, information, code or command. . . .”). Mr. Hart is mistaken.
 15 In Section 1030(a)(5)(A)(i), “without authorization” does not modify “transmission.”
 16 Rather, it modifies “damage.”¹⁰ *See* 18 U.S.C. § 1030(a)(5)(A)(i) (“Whoever . . .
 17 knowingly causes the transmission of a program, information, code, or command, and as
 18 a result of such conduct, intentionally causes damage without authorization, to a
 19 protected computer.”); *Arthur J. Gallagher & Co. v. Edgewood Ptnrs. Ins. Ctr.*, No. 07-
 20 06418, 2008 U.S. Dist. LEXIS 8924, *7 (N.D. Cal. 2008); *Speed*, 2006 U.S. Dist. LEXIS
 21 53108, *21 n.8; *Lloyd v. United States*, No. 03-813, 2005 U.S. Dist. LEXIS 18158, at *24
 22 (D.N.J. 2005) (“[T]he term ‘without authorization’ modifies the element of intentionally
 23 causing damage to a computer. To read the statute as Petitioner does requires twisting
 24 the statutory language and violates common sense.”). Accordingly, it does not matter
 25 whether Comcast was authorized to transmit reset packets. What matters is whether it
 26 was authorized to temporarily delay congestive transmissions on its network. And it was.

27 ¹⁰ This is in contrast to other the other parts of § 1030(a)(5)(A), in which Congress decided that
 28 “without authorization” would modify “access.” *See* 18 U.S.C. §§ 1030(a)(5)(A)(ii), (a)(5)(A)(iii).

Finally, applying the CFAA here would give it a scope unintended by Congress. *See* 136 Cong. Rec. S4568-01, 4614 (Apr. 1990) (statement of Sen. Leahy) (explaining that the CFAA should not “open the floodgates” to litigation); *Shamrock Foods Co. v. Gast*, No. 08-0219, 2008 WL 450556, at *4 (D. Ariz. Feb. 20, 2008) (“[T]he legislative history supports a narrow view of the CFAA” because it “[t]he civil component is an afterthought.”). The very purpose of Section 1030(a)(5) is to prevent hackers from damaging computer systems or clogging networks with worms or other malware. *See* S. Rep. No. 101-544, at 5-6 (1990) (discussing worm that “quickly replicated itself and spread to computers throughout the network” and “clogged the network for two days”); S. Rep. No. 104-357, at 4-5 (1996) (discussing amended § 1030(a)(5)); 139 Cong. Rec. S16421-03 (Nov. 19, 1993) (statement of Sen. Leahy) (discussing worms that “hopelessly clog computer networks”); *Werner-Matsuda*, 390 F. Supp. 2d 479, 496 (D. Md. 2005). Congress cannot have intended for the CFAA, a criminal statute,¹¹ to be read in a way that prevents P2P management and allows P2P traffic to clog the Internet. In short, imposing liability here would turn the CFAA on its head. Such an “anomalous result” is, to put it mildly, “not easily attributable to congressional intent.” *Cedar Rapids v. Garret F.*, 526 U.S. 66, 78 n.10 (1999); *American Tobacco v. Patterson*, 456 U.S. 63, 71 (1982).

3. Comcast’s Advertisements Are Not “Untrue or Misleading”

Mr. Hart’s fraud claims also fail because Comcast disclosed that it manages network congestion and because none of its advertisements was untrue or misleading.

It is axiomatic that a consumer fraud claim cannot stand if the practice in question is disclosed. *See Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 965 (2003); *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153 (2000). Here, although for a variety of valid reasons Comcast did not provide a blueprint of its network management tools,¹² it did

¹¹ A criminal statute first and foremost, the CFAA must be narrowly construed. *Werner-Matsuda*, 390 F. Supp. 2d at 499; *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004).

¹² Disclosures must strike an appropriate balance between informing consumers and other important considerations. For example, requiring an ISP to describe its network management in detail would allow a small but sophisticated group of users to evade those measures altogether. This is a real problem, not an

1 disclose that it monitors congestion and takes appropriate steps to prevent congestive
2 transmissions from interfering with the use of its services, including managing them
3 when necessary. In light of those disclosures, Mr. Hart's fraud claims cannot stand.

4 And assuming for the sake of argument that Comcast's disclosures are deemed
5 inadequate in some way, Mr. Hart's claims still fail because none of the advertisements
6 he cites was misleading. Under the CLRA, FAL and UCL, a statement is only actionable
7 if it is false or reasonably likely to mislead a reasonable consumer. *Williams v. Gerber*
8 *Prods. Co.*, 439 F. Supp. 2d 1112, 1115 (S.D. Cal. 2006); *Anunziato v. eMachines, Inc.*,
9 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005); *Summit Tech., Inc. v. High-Line Med.*
10 *Instruments, Co.*, 933 F. Supp. 918, 931 (C.D. Cal. 1996); *In re All Terrain Vehicle Litig.*,
11 771 F. Supp. 1057, 1061 (C.D. Cal. 1991); *Consumer Advocates v. Echostar Satellite*
12 *Corp.*, 113 Cal. App. 4th 1351, 1361 (2003). Comcast's advertisements were neither.

13 Most of the representations cited by Mr. Hart are puffery that is not actionable.
14 For example, Mr. Hart cites advertisements in which Comcast offered "lightning speed,"
15 "scorching speed," "mind-blowing speed," "crazy fast speed," and speed that is "way
16 faster than DSL." Pl.'s Compl. ¶ 40. Those statements are incapable of measurement,
17 could not possibly have misled Mr. Hart,¹³ and, more importantly, could not possibly

18 imagined one. See DCIA, *Comment on Petition for Rulemaking*, *supra*, at 8; Rich Karpinski, Telephony
19 Online, *BitTorrent developers seek traffic-shaping route-around* (Feb. 19, 2008) (reporting only a week
20 after Comcast filed FCC comments that BitTorrent programmers had used the now-public information to
21 develop a way to "thwart" Comcast's P2P management), available at <http://telephonyonline.com/broadband/news/bittorrent-traffic-shaping-0219>; see also Ernesto, *How to Encrypt BitTorrent Traffic*,
22 TorrentFreak.com, available at <http://torrentfreak.com/how-to-encrypt-bittorrent-traffic>. Thus, it is no
23 answer to say, as Mr. Hart may, that network management should simply be disclosed more completely.
24 If it were, it would be ineffective. As a result, any state law that requires "disclosure" of actual network
25 management would be preempted for the reasons set forth above. In addition, requiring Comcast to
26 describe its network management in detail would make its contracts hundreds of pages long, and no doubt
27 Mr. Hart would take issue with their length. See, e.g., Pl.'s Compl. ¶ 30.

28 ¹³ It bears mention that Mr. Hart has not alleged seeing or relying on any of these advertisements.
See Pl.'s Compl. ¶¶ 40-41. The only representation he specifically alleges seeing was the statement that
he would "enjoy unfettered access" to the Internet. *Id.* ¶ 55. But he does not allege whether he saw that
FAQ before he subscribed or whether he or his counsel simply saw it while preparing his Complaint.
Accordingly, he has not satisfied Federal Rule of Civil Procedure 9(b), see *Edwards v. Marin Park, Inc.*,
356 F.3d 1058, 1066 (9th Cir. 2004), or established causation as required by the UCL and CLRA. See
Cal. Civ. Code § 1770(a); Cal. Bus. & Prof. Code § 17204; see also *Wilens v. TD Waterhouse Group,*
Inc., 120 Cal. App. 4th 746, 754 (2003); *Caro v. Proctor & Gamble*, 18 Cal. App. 4th 644, 668 (1998).

1 have mislead a reasonable consumer. After all, at what point does speed become
 2 “scorching”? And would a reasonable consumer even want speed that was literally
 3 “mind-blowing”? These are innocuous, subjective statements. They are not actionable.

4 Mr. Hart also claims that he was promised a “maximum upload speed” and speed
 5 that was “up to 4 times faster than 1.5 Mbps DSL and up to twice as fast as 3.0 Mbps
 6 DSL.” Pl.’s Compl. ¶¶ 42, 40. Although these statements may seem more objective,
 7 they are not relevant to Mr. Hart’s claims, as he does not allege that Comcast slows the
 8 transmission speed of uploads in any way. And it doesn’t. At most, an upload might
 9 have to be restarted during periods of congestion, and only when necessary to preserve
 10 the quality of service being provided to the great majority of subscribers. But even then,
 11 the transmission speed during the actual upload is never slowed. Thus, advertisements
 12 about “speed” could in no way be fraudulent. In any event, Mr. Hart cites a “maximum”
 13 speed “up to” a certain level, not a minimum speed no slower than a certain level –
 14 statements that would only be untrue if his service were *too fast*.

15 The only other representation cited by Mr. Hart is the statement that he would
 16 “enjoy unfettered access to all the content, services, and applications that the internet has
 17 to offer.” Pl.’s Compl. ¶ 55. This too is puffery, as no reasonable consumer – let alone a
 18 sophisticated user of P2P protocols – would expect that the use of Comcast’s service
 19 would be unconstrained in any way whatsoever. Taken literally, this statement would
 20 even prevent Comcast from managing its network in order to protect subscribers from
 21 spam and worms, as that protection conceivably “fetters” access to the Internet.
 22 Reasonable consumers expect Comcast to use its best efforts to filter such things. Indeed,
 23 they rely on Comcast to do so. Thus, Mr. Hart can only quibble about the propriety of
 24 managing congestive P2P traffic as opposed to managing congestive worms or spam –
 25 a policy debate better left to the FCC, which is hearing that debate at this very moment.
 26 Moreover, this statement comes from a FAQ formerly posted on Comcast’s website.
 27 Read in its entirety, that FAQ cannot reasonably be understood to suggest that Comcast
 28 does not manage its network. Rather, it stated that subscribers would not be restricted

1 based on the type of lawful **content** they choose to view, which is true.¹⁴ That becomes
 2 clear when this FAQ is read in conjunction with Mr. Hart's contract, the AUP, and the
 3 other FAQs on Comcast's website – all of which disclose that Comcast offers a shared
 4 network, that Comcast monitors its network for congestive transmissions that could affect
 5 other users, and that Comcast takes appropriate action to prevent that from happening.

6 **4. Comcast Did Not Breach Any Contractual Duty To Mr. Hart**

7 Mr. Hart's breach of contract claim fails for the simple reason that he has not
 8 identified, and cannot identify, a single provision of his contract that has been breached.
 9 A breach of contract claim requires not only a contract, but also a breach of that contract,
 10 and it is the plaintiff's burden to identify one. *Kapsimallis v. Allstate Ins. Co.*, 104 Cal.
 11 App.4th 667, 675 (2002); *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 913
 12 (1971). Here, Mr. Hart has not identified any provision of his contract that was breached.
 13 And it is abundantly clear that he cannot, as Comcast did exactly what it said it would do:
 14 monitor its network for congestion and take appropriate remedial measures as needed.¹⁵
 15 More importantly, however, there is no provision in Mr. Hart's contract that promises **not**
 16 to engage in network management activities such as those at issue here, and thus no
 17 provision that even arguably has been breached by Comcast's doing so.

18 **5. Comcast Did Not Breach Any "Implied" Duty To Mr. Hart**

19 Perhaps recognizing that his contract has not been breached in any way, Mr. Hart
 20 has pleaded an alternative claim for breach of an implied covenant of good faith and fair
 21 dealing, the gravamen of which is that it is unfair for Comcast to manage P2P traffic.

22
 23 ¹⁴ See FAQ: Do You Discriminate Against Particular Types Of Online Content?, previously
 24 available at <http://www.comcast.net/help/faq/index.jsp?faq=Hot118988> ("Do you discriminate against
 25 particular types of online content? No. There is no discrimination based on the type of content. Our
 customers enjoy unfettered access to all the content, services, and applications that the Internet has to
 offer. . . .") (Exhibit B to RFJN).

26 ¹⁵ Mr. Hart alleges that "none of the terms of service state that Comcast can or will impede, limit,
 27 discontinue, block or otherwise impair or treat differently" file-sharing applications. Pl.'s Compl. ¶ 42.
 That is patently false, as explained above. Although normally the allegations of a complaint are taken as
 28 true for purposes of pre-discovery dispositive motions, they are not if they concern documents that are
 referenced in the complaint. See, e.g., *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

1 This claim is defective for a number of reasons. First, like Mr. Hart's other state law
 2 claims, this claim is preempted by federal law. Second, courts cannot imply a duty not to
 3 do something if the parties' contract permits them to do that very thing. *See Yerkovich v.*
 4 *MCA, Inc.*, No. 98-55660, 2000 U.S. App. LEXIS 3259, at *4 (9th Cir. 2000) (citing
 5 *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798 (1995)). But that is just what Mr.
 6 Hart is asking this Court to do, as the parties' contract specifically permits Comcast to
 7 manage congestive transmissions such as P2P file sharing traffic. Finally, Comcast's P2P
 8 management does not amount to bad faith. To the contrary, it is essential to the provision
 9 of broadband services. As a matter of law, conduct does not amount to bad faith if it is
 10 commercially reasonable under the circumstances. This is. *See Foothill Props. v. Lyon*
 11 *Copley Corona Assocs.*, 46 Cal. App. 4th 1542, 1551-1552 (1996); *Balfour, Burthrie &*
 12 *Co. v. Gourmet Farms*, 108 Cal. App. 3d 181, 191 (1980).

14 IV. CONCLUSION

15 As the Ninth Circuit has observed, deciding what our national Internet policy
 16 should be "is not our task, and in our quicksilver technological environment it doubtless
 17 would be an idle exercise. . . . Like Heraclitus at the river, we address the Internet aware
 18 that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal
 19 landscape, and chart a course by the law's words." *City of Portland*, 216 F.3d at 876.
 20 Here, the legal landscape and the letter of the law require that these claims either be
 21 rejected or stayed until the FCC does so.

22
 23 Respectfully submitted,

24 Dated: March 14, 2008

DRINKER BIDDLE & REATH LLP

25 /s/ Michael J. Stortz
 26 MICHAEL J. STORTZ

27 *Counsel for Defendants*